Supreme Court, U.S.
FILED
DEC 26 2000
OFFICE OF THE CLERK

(2)

No. 00-845

In The

Supreme Court of the United States

CAROL HOOD, as guardian ad litem of Zachary Hood, a minor,

Petitioner,

v.

MEDFORD TOWNSHIP BOARD OF EDUCATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

MADDEN, MADDEN & DEL DUCA
MICHAEL P. MADDEN, ESQUIRE
Counsel of Record
PATRICK J. MADDEN, ESQUIRE
108 Kings Highway East, Suite 200
Post Office Box 210
Haddonfield, New Jersey 08033
Tel: (856) 428-9520

Counsel for Respondents, Grace Oliva, Gail Pratt, Patrick Johnson & Medford Township Board of Education

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

24 pp

QUESTION PRESENTED

Whether a first grade student has a First Amendment right to read "The Beginner's Bible" to his classmates as part of a school assignment and whether that student has a concomitant right to recover compensatory and punitive damages from his first grade teacher when that teacher, in an exercise of her educational judgment, determines that "The Beginner's Bible" should not be read to a captive audience of six and seven year old children, as part of her class curriculum and under her supervision.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

1. Factual Background 2

   a. Petitioner's claim is not based upon a school or district policy but on the single, discretionary decision of one first grade teacher 2

   b. Petitioner's son requested to read "The Beginner's Bible" to his classmates, during class time, as part of the curriculum of that class 3

   c. Petitioner's son asked to read a children's version of the Holy Bible to his classmates and not a story loosely based upon a biblical story 3

   d. Petitioner seeks only monetary damages 4

2. The Proceedings Below 4

REASONS FOR DENYING THE WRIT 8

I. The Court Of Appeals' Decision Does Not Conflict With The Decision Of This Court And The Decisions Of The Other Circuits 8

   A. The Decision Below Is Not In Conflict With The Decisions Of The Seventh, Eighth, Tenth And Eleventh Circuits 9

TABLE OF CONTENTS – Continued

Page

B. The Decision Below Does Not Conflict With The Decisions Of This Court In *Lamb's Chapel* And *Rosenberger* 13

II. The Petition For Writ Of Certiorari Should Be Denied As Premature..... 17

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635 (1987) 7

Berger v. Rensselaer Cent. Sch. Corp., 982 F.2d 1160 (7th Cir. 1993) 10

Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) 12

Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens, 496 U.S. 226 (1990) 15

Chandler v. James, 180 F.3d 1254 (11th Cir. 1999), *cert. granted, vacated and remanded sub nom. Chandler v. Siegelman*, 120 S.Ct. 2714 (2000) 13

Chandler v. Siegelman, 2000 WL 1557134 (11th Cir. 2000) 12, 13

Church on the Rock v. City of Albuquerque, 84 F.3d 1273 (10th Cir.), *cert. denied*, 519 U.S. 949 (1996) 12

Good News Club v. Milford Cent. Sch., 202 F.3d 502 (2d Cir. 2000) 8, 9, 11

Good News/Good Sports Club v. School Dist. of the City of Ladue, 28 F.3d 1501 (8th Cir. 1994) 11

Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) ..... *passim*

Hedges v. Wauconda Comm. Unit Sch. Dist. No. 118, 9 F.3d 1295 (7th Cir. 1993) 9, 10

Henerey v. City of St. Charles Sch. Dist., 200 F.3d 1128 (8th Cir. 1999) 11

Lamb's Chapel v. Center Moriches Sch. Dist., 508 U.S. 385 (1993) 7, 13, 14, 17

TABLE OF AUTHORITIES – Continued

Page

Muller v. Jefferson Lighthouse School, 98 F.3d 1530 (7th Cir.), *cert. denied*, 520 U.S. 1156 (1997) 10

Rosenberger v. Rector and Visitors of the Univ. of Virginia, 515 U.S. 819 (1995) 7, 13, 14, 15, 17

Santa Fe Independent Sch. Dist. v. Doe, 530 U.S. 290 (2000) 13, 15, 16, 17

Virginia Military Institute v. United States, 508 U.S. 946 (1993) 17

Webster v. New Lenox Sch. Dist. No. 122, 917 F.2d 1004 (7th Cir. 1990) 11

Wilson v. Layne, 526 U.S. 603 (1999) 7

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. I 1

STATUTES

42 U.S.C. § 1983 1

BRIEF IN OPPOSITION TO PETITION FOR WRIT FOR CERTIORARI OF RESPONDENTS GRACE OLIVA, GAIL PRATT, PATRICK JOHNSON and MEDFORD TOWNSHIP BOARD OF EDUCATION

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

Petitioner seeks plenary review of an *en banc* decision of the Court of Appeals for the Third Circuit affirming the District Court's decision which held: a first grade teacher, and other public school officials, cannot be liable

for damages when that first grade teacher, in a proper exercise of her educational judgment, did not permit Petitioner's son to read a children's version of the Holy Bible to his classmates, during class time and as part of the class curriculum. The Third Circuit specifically affirmed the District Court's judgment on the pleadings with respect to this claim. There is another claim not before this Court which has been remanded to the District Court for further factual development.

1. Factual Background.

The factual background of Petitioner's claim is adequately set forth within the petition. However, certain factual matters which dictate against the granting of the writ must be highlighted.[1]

a. Petitioner's claim is not based upon a school or district policy but on the single, discretionary decision of one first grade teacher.

Petitioner presents this writ as concerning a public school policy related to student reading material. This is not the case. Petitioner did not allege any policy, custom or practice on the part of the Respondent Medford Township Board of Education. App. 7a, 9a. Petitioner's claim is based solely upon a challenge to the educational judgment of a first grade teacher respecting the request of

---

[1] It should also be noted that these facts are based solely on the pleadings, admitted below in the context of Respondents' Rule 12(c) motion.

Petitioner's son to read "The Beginner's Bible" to his classmates as part of the curriculum of that class.

b. Petitioner's son requested to read "The Beginner's Bible" to his classmates, during class time, as part of the curriculum of that class.

Respondent, Grace Oliva, as part of the reading curriculum for her first grade class, permitted those students reaching a certain level of reading proficiency to read a book of their own choosing to the rest of the class. App. 73a. The readings were in the presence and under the supervision of Respondent Oliva, who, prior to the reading, reviewed each student's selection to ensure that it would be suitable for first grade students. The request of Petitioner's son to read "The Beginner's Bible" to his classmates was not a "private" exercise of speech, but rather "state-sponsored" speech occurring as part of the class curriculum.

c. Petitioner's son asked to read a children's version of the Holy Bible to his classmates and not a story loosely based upon a biblical story.

The selection of Petitioner's son was a book entitled "The Beginner's Bible." The cover of the book states the title – "The Beginner's Bible" – and depicts characters from the New and Old Testaments such as Jesus Christ, the apostle Peter, Moses, Noah and Adam and Eve. Each "story" in The Beginner's Bible is based upon an excerpt from the Old and New Testaments. The stories identified include: Jesus' Birth And Resurrection; The Annunciation

to the Virgin Mary; Jesus' Feeding of the Multitude; and Jesus in the Temple.

Petitioner's son informed Respondent Grace Oliva that he wished to read the "A Big Family" to the class. "A Big Family" is based upon Genesis, Chapters 29-33, and tells the story of Jacob's return to his brother Esau. The first page of the story states at the bottom "JACOB RETURNS, from Genesis 29-33", clearly identifying the story's source as the Holy Bible. App. 44a.

d. Petitioner seeks only monetary damages.

Petitioner seeks only money damages against Respondents Grace Oliva, Gail Pratt, Patrick Johnson and the Medford Township Board of Education. App. 46a. Petitioner cannot seek injunctive relief as to these Respondents because her son is no longer a student in the Medford School District and, for reasons unrelated to this case, is currently attending school in another community. App. 45a. Thus, Petitioner seeks only compensation (probably difficult to quantify to begin with) for this alleged one-time incident regarding "The Beginner's Bible."

2. The Proceedings Below.

Petitioner's summary of the proceedings below is notable primarily for its omission of the one case upon which the District Court based its decision and upon which the panel of the Third Circuit based its affirmance.

That case is *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). 49a, 90a-95a.[2]

While the District Court noted that speech in a non-public form must be viewpoint neutral, it specifically stated:

> In the context of the classroom, the inquiry is more specific: educators may "exercis[e] editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."

App. 91a (citation to *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. at 273). The District Court further noted Petitioner's concession that this is the applicable standard. App. 91a.

Analyzing Petitioner's claims under this standard, the District Court went on to find that Respondents did have legitimate pedagogical concerns in preventing an appearance of state endorsement of religion.

> [H]ad the Medford defendants allowed Z.H. to read the "Beginner's Bible" to the rest of his first grade classmates, the possibility exists that they could have construed the presentation to be an endorsement of the Bible by the teacher . . . If Z.H.'s teacher were to praise him for completing his reading assignment skillfully, (i.e. by saying something like "very good"), it is not unlikely that a child in first grade could interpret that comment as an endorsement of the story and the book. *See* Medford Defs.' Br. at

---

[2] The evenly divided *en banc* court affirmed the District Court's judgment "without further explication" in accordance with Third Circuit tradition. App. 4a, 11a.

> 21. Therefore, allowing Z.H. to read from the "Beginner's Bible" only to his teacher was a proper accommodation of Z.H.'s right of free expression and the principle of separation of church and state.

App. 93a-95a.

The Court further rejected Petitioner's arguments that "The Beginner's Bible" would not have been offensive to Muslim, Hindu or Jewish students, noting that "[e]ven if every single student teacher and administrator in Z.H.'s public school were strong adherents to Christianity, the Medford defendants' actions would still be appropriate." App. 94a.

The initial memorandum opinion of the Court of Appeals for the Third Circuit affirmed and echoed the District Court's analysis under *Hazelwood* and emphasized the need to "give substantial deference to public school authority discretionary decisions regarding what subjects are appropriate for elementary school classroom discussion." App. 68a.

The second panel opinion of the Court of Appeals affirming the District Court was hardly based "on very different ground" or a "reverse[al]" of its previous panel opinion. Petition for a Writ of Certiorari at 5. Rather, again, the panel of the Circuit Court relied upon *Hazelwood Sch. Dist. v. Kuhlmeier*, described by it as "the Supreme Court precedent most helpful in the current context." App. 49a. Relying upon *Hazelwood*, the panel noted that educators may impose non-viewpoint neutral restrictions on the content of student speech in school-sponsored expressive activities so long as those restrictions are reasonably related to legitimate pedagogical

concerns. "Contrary to plaintiff's suggestion, this remains the law of the land." App. 53a.

The Circuit Court noted the distinction between private student speech, which must be tolerated, and speech within school-sponsored expressive activities "that students, parents and members of the public might reasonably perceive to bear the imprimatur of the school." App. 50a (citation and quotation from *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. at 270-71). The panel further easily distinguished *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 385 (1993) and *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995), noting that neither case dealt with school-sponsored expressive activity in a traditional classroom setting. App. 53a.

Petitioner again sought rehearing *en banc* which was granted on December 1, 1999. On August 28, 2000, the *en banc* court issued its decision affirming the District Court with reference to Petitioner's claim regarding the reading of "The Beginner's Bible." App. 1a.

The proceedings below are notable in that because the case never passed the pleading stage, the issue of Respondents' qualified immunity from liability was never reached. *See, e.g., Wilson v. Layne*, 526 U.S. 603, 614 (1999). Specifically, Respondents cannot be subject to liability unless Petitioner's son had a "clearly established right" to read "The Beginner's Bible" to his classmates. *Anderson v. Creighton*, 483 U.S. 635, 636-37 (1987). If anything may be said regarding the "right" to read "The Beginner's Bible" to the classmates of Petitioner's son, it is that this right was not at all clearly established at the time of the incident. If anything, the contrary is true. It may be that

nothing highlights this more than the proceedings below: Petitioner's claim was dismissed by the District Court, that dismissal was affirmed twice by a panel of the Circuit Court and a third time by the evenly divided Circuit Court sitting *en banc*. It would be an anomalous result indeed to hold that a first grade teacher should have known that she was violating a student's rights when she refused to allow him to read "The Beginner's Bible" to his classmates when at least six judges of the Third Circuit Court of Appeals (seven if you count the Honorable Joseph J. Longobardi, Senior United States District Judge for the District of Delaware who sat on the panel deciding Petitioner's appeal but did not participate in the *en banc* decision) felt that Petitioner did not have that right.

REASONS FOR DENYING THE WRIT

I. The Court Of Appeals' Decision Does Not Conflict With The Decision Of This Court And The Decisions Of The Other Circuits.

Petitioner's application for a writ of certiorari is premised upon a false conflict among the Circuit Courts. The falsity of Petitioner's argument is immediately evident from a cursory review of the cases upon which she relies. Petitioner initially characterizes *Good News Club v. Milford Cent. Sch.*, 202 F.3d 502 (2d Cir. 2000), *cert. granted*, 121 S.Ct. 296 (Oct. 10, 2000) (No. 99-2036) as dealing with the "same issue" presented by the facts of this case. Petition for a Writ for Certiorari at 10. Nothing could be

further from the truth. *Good News Club* involved access to school facilities by a religious group during non-school hours. *Good News Club v. Milford Cent. Sch.*, 202 F.3d at 504. *Good News Club* was in no way concerned with "state-sponsored expressive activities" occurring within the classroom as part of the class curriculum squarely controlled by *Hazelwood*. The distinction between the use of school property discussed in *Good News Club* and the regulation of state sponsored student speech in *Hazelwood* is not purely technical. Rather, this distinction goes to the heart of this Court's Free Exercise and Establishment Clause jurisprudence.

A. The Decision Below Is Not In Conflict With The Decisions Of The Seventh, Eighth, Tenth And Eleventh Circuits.

The Third Circuit's decision regarding the regulation of student speech in the context of the curriculum of a first grade class is not in conflict with the decisions of the Seventh, Eighth, Tenth and Eleventh Circuits. The cases relied upon by Petitioner are distinguishable on their facts and on the law, as all of these decisions dealt with either "private" student speech or "equal access" claims. None of the cases relied upon by Petitioner deal with the regulation of "state sponsored" speech in a first grade classroom.

In *Hedges v. Wauconda Comm. Unit Sch. Dist. No. 118*, 9 F.3d 1295 (7th Cir. 1993), the Seventh Circuit held that it was permissible for a junior high school student to distribute religious literature in the hallway of the school.

The Court noted the important distinction between "private" religious speech, which must be tolerated, and religious speech that students would believe is sponsored by the school, noting a school district's "duty to avoid taking sides in religious controversies." *Id.* at 1298. In holding that it was permissible for students to distribute religious literature from a designated location near the school's entrance between the hours of 7:15 a.m. to 7:45 a.m. and 3:15 p.m. to 3:45 p.m., the Court noted that:

> The point of the distinction that we have stressed between private and public acts is that the printed material pupils pass out in the halls will not be analyzed or critiqued in class as part of the school's educational program.

Id. at 1301.

Thus, on its facts, *Hedges* was not concerned with school-sponsored speech occurring as part of the curriculum. In fact, the Court in *Hedges* cited as an example of improper school promotion of religious speech a school district which gave a religious group preferential treatment, convened the student body to hear their presentation and required each pupil to accept a Bible in a formal ceremony. *Id.* at 1299 (citing to *Berger v. Rensselaer Cent. Sch. Corp.*, 982 F.2d 1160 (7th Cir. 1993)).

The Seventh Circuit's recognition of this distinction between private and "school-sponsored" speech (a distinction which Petitioner fails to recognize or understand) can be seen in *Muller v. Jefferson Lighthouse School*, 98 F.3d 1530, 1545 (7th Cir.), *cert. denied*, 520 U.S. 1156 (1997)

(fourth grade plaintiff "free to express himself on religious matters, in both written and spoken form, subject only to restrictions reasonably related to legitimate pedagogical interests.") and *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004 (7th Cir. 1990) (teacher had no right to teach creationism because of school's important pedagogical interest in establishing the curriculum and legitimate concern with possible Establishment Clause violation).

Good News/Good Sports Club v. School Dist. of the City of Ladue, 28 F.3d 1501 (8th Cir. 1994), *cert. denied*, 515 U.S. 1173 (1995), is similarly inapposite to the facts of this case for the same reasons as *Milford*. Namely, *Good News/Good Sports Club* dealt only with the equal access claim of a religious club seeking the use of school facilities after school hours on the same basis as other secular organizations. The Court noted that the advanced age of the students (junior high school) did not present an Establishment Clause concern; the club meetings would be held after instructional hours when student attendance is no longer compelled; and the club did not involve the participation of teachers, thereby creating a problem of "the students' emulation of teachers as role models." *Id.* at 1509-1510. Given that the Court in *Good News/Good Sports Club* was not presented with state-sponsored student speech occurring as part of the school's curriculum, it did not apply *Hazelwood*'s test of legitimate pedagogical concerns. *Cf. Henerey v. City of St. Charles Sch. Dist.*, 200 F.3d 1128 (8th Cir. 1999) (regulation of student's speech occurring during campaign for class president was reasonably related to legitimate pedagogical concerns, noting that student speech uttered during participation in

school sponsored activity carries the "imprimatur of the school.") (citation to *Hazelwood*, 484 U.S. at 271).

Church on the Rock v. City of Albuquerque, 84 F.3d 1273 (10th Cir.), *cert. denied*, 519 U.S. 949 (1996), exposes in the most direct way the falsity of plaintiff's argument that there is a "conflict" between the Circuits. Namely, this decision dealt with a city policy related to the showing of a religious film at city-owned *senior centers*. *Church on the Rock* was in no way concerned with the dissemination or discussion of religion in a first grade classroom. One comment from *Church on the Rock* serves to highlight the importance of this distinction:

> [T]he showing of the Jesus film and the distribution of giant print New Testaments can hardly be construed as intimidating or coercive. *People who choose to attend presentations at the senior centers do not become part of a captive audience*: attendance at such programs is purely voluntary and people are free to come and go as they please.

Id. at 1280 (emphasis added).

The distinction between the purely voluntary attendance of persons at the senior center at issue in *Church on the Rock* and the compelled attendance of first grade students requires no further elucidation. *Please see Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986) (describing children in public schools as being a "captive audience").

Lastly, there is no conflict with *Chandler v. Siegelman*, 2000 WL 1557134 (11th Cir. 2000). As with the other Circuit Court decisions relied upon by Petitioner,

Chandler was not concerned with state-sponsored student speech occurring in the context of a first grade classroom. In fact, the Eleventh Circuit noted that "even genuinely student-initiated religious speech may constitute state action if the state participates in or supervises the speech . . . therefore, student religious speech must be without oversight, without supervision, subject only to the same reasonable time, place and manner restrictions as all other student speech in school." *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999), *cert. granted, vacated and remanded sub nom. Chandler v. Siegelman*, 120 S.Ct. 2714 (2000) (decision of the Circuit Court upholding policy permitting student initiated prayer at school events vacated and remanded for further consideration in light of the decision of *Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290 (2000)). As with *Chandler*, the District and Circuit Courts below did not condone the "censorship" of private student religious speech. Rather, the District Court and Circuit Court were faced with state-sponsored religious speech, i.e., speech occurring as part of the first grade curriculum. It is this critical distinction that sets Petitioner's claim apart from those decisions allegedly in "conflict" with the Third Circuit and it is that critical distinction which compels the denial of this petition for a writ of certiorari.

B. The Decision Below Does Not Conflict With The Decisions Of This Court In *Lamb's Chapel* And *Rosenberger*.

As set forth above, the "conflict" between the Third Circuit and the decisions of four other circuits is non-existent. Similarly, Petitioner's argument that the Third

Circuit's decision conflicts with *Lamb's Chapel* and *Rosenberger* is based upon a tortured reading of both of these cases, neither of which was concerned with the regulation of state-sponsored student speech in the non-public, closed forum of a first grade classroom.

Both *Lamb's Chapel* and *Rosenberger* are easily distinguished from this case. In *Lamb's Chapel*, plaintiff sought permission to use school facilities on a weekend to show a film on child rearing with a religious viewpoint. This Court emphasized:

> The showing of this film series *would not have been during school hours*, would not have been sponsored by the school and would have been open to the public, not just to church members.

Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993) (emphasis added).

In short, *Lamb's Chapel* is a case that deals solely with the ability of religious groups to have equal, after-hours use of public school facilities that have been opened up for use by other groups such as the Boy Scouts, Cub Scouts, community groups, etc. *Lamb's Chapel* is not a case which deals with the regulation of student speech as part of a public school's curriculum.

Similarly, *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995) has absolutely nothing to do with the regulation of classroom speech in a university setting, let alone the regulation of speech in a first grade classroom. The Court in *Rosenberger* itself stated that "a holding that the university may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech,

which is controlled by different principles." *Id.* at 834 (citing to *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. at 270-272). Factually, *Rosenberger* was presented with an issue related to the funding of a publication with a Christian editorial viewpoint at a public university. Again, the distinction between the funding of a publication at an institution of higher learning, compared with the restriction of a first grader's class presentation is evident on its face to everyone but Petitioner. The latter, and the facts of this case, is controlled by the deferential standard set forth in *Hazelwood*. The former, and the facts as set forth in *Rosenberger*, is perhaps controlled by a more strict standard.

Closer to the fact of this case is a decision Petitioner leaves unmentioned: *Santa Fe Independent Sch. Dist. v. Doe*, 120 S.Ct. 2266 (2000) invalidating policy of permitting student led, student initiated prayer before football games because of Establishment Clause concerns. In striking the District's policy, this Court insisted that "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Id.* at 2275 (quoting from *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens*, 496 U.S. 226, 250 (1990) (opinion of O'CONNOR, J.)). Moreover, the Court concluded that the pre-game invocation could not be regarded as "private speech", noting that: the invocations were authorized by a government policy; the invocations took place on government property; and the invocations were given at government-sponsored, school-related events. *Id.* at 2278.

If anything, the facts presented by this case are more egregious than those presented to the Court by *Santa Fe*. The speech at issue in *Santa Fe* took place as part of a school's extra-curricular activity and not part of a school's curriculum. Additionally, attendance at the football games discussed in *Santa Fe* was not compelled.[3] The location of the speech itself, while on school property, occurred out of doors and not inside the school itself. Furthermore, the students at issue in *Santa Fe* were in high school and thus from between 14 to 18 years of age.

Comparatively, Petitioner's speech at issue in this case occurred (or would have occurred were it not for the actions of Respondent Oliva) in the classroom and as part of the first grade class curriculum, with the approval and under the supervision of Respondent Oliva. Additionally, these first grade classmates fit the traditional definition of a "captive audience" and would not have been able to absent themselves from the reading of "The Beginner's Bible." Lastly, the classmates of Petitioner's son were only in the first grade and, thus, least likely to be able to distinguish between a choice of reading that was his alone and a selection that bore his teacher's approval and the concomitant "imprimatur" of the state.

---

[3] The Court did note that attendance is certainly mandatory for certain members of the school, such as the football players, cheerleaders, band members, etc. *Id.* at 2280. That said, there is still a distinction between attending an after-school athletic event (which is not mandatory in truest sense of the word) and attendance at school itself which the state absolutely compels.

Thus, the decision below is certainly compelled by *Santa Fe* and the purported conflict with *Rosenberger* and *Lamb's Chapel* is nonexistent.

II. The Petition For Writ Of Certiorari Should Be Denied As Premature.

"We generally await final judgment in the lower court before exercising our certiorari jurisdiction." *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (opinion of SCALIA, J. respecting the denial of the petition for writ of certiorari).

The decision of the Circuit Court below is certainly interlocutory in nature because it did not dispose of all issues as to all parties. Notably, Petitioner's claim related to the relocation of a poster of Jesus Christ was remanded to the District Court in order to permit Petitioner to amend. Petitioner has not yet amended, therefore this aspect of Petitioner's case has not been resolved. Additionally, Petitioner has not indicated that the claim related to the poster is being dismissed.

Petitioner also appears to have placed some great importance upon this claim related to the poster, viewing it as evidence of a continuum of hostility toward religion as exhibited by Respondents. As an example, while the claim related to the poster has been remanded and certainly is not before this Court, Petitioner discusses the so-called "poster incident" and the Court of Appeals' *en banc* opinion with respect to the poster incident at length. Petition for a Writ of Certiorari at 5 and 8-9.

Clearly then, if Petitioner feels that the poster incident is important enough to be discussed in the context of the petition for a writ of certiorari, any review in this Court should await the disposition of this claim. Thus, the exercise of this Court's certiorari jurisdiction (if at all) should await final judgment.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

MADDEN, MADDEN & DEL DUCA
MICHAEL P. MADDEN, ESQUIRE
Counsel of Record
PATRICK J. MADDEN, ESQUIRE
108 Kings Highway East, Suite 200
Post Office Box 210
Haddonfield, New Jersey 08033
Tel: (856) 428-9520

Counsel for Respondents,
Grace Oliva, Gail Pratt,
Patrick Johnson & Medford
Township Board of Education